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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 930

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,

Petitioners,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY MEMORANDUM FOR PLAINTIFFS.

The principal point made in opposition to the petition seems to be that fifteen other acts of Congress authorizing Indian tribes to sue the United States in the Court of Claims contain the provision that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," and that it is unbelievable that

Congress intended to reopen settlements in all of those cases.

To which we reply:

1. The fact that this provision is contained in fifteen other acts of Congress passed since 1920 and has never been construed by this Court, nor by the Court of Claims except in the present case,[1] is itself a ground for allowing the petition in order that the meaning of the provision may be settled for the guidance of the Court of Claims in other cases.

2. There is nothing before the Court to show what settlement agreements there were in these other cases that might be affected by construing the provision in question as reopening claims for determination on the merits; nor to what

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[1] The Government cites the case of *Creek Nation* v. *United States*, 63 Ct. Cl. 270. But nowhere in the opinion in that case is the provision here in question discussed or even mentioned. The jurisdictional act there was limited to claims "arising under or growing out of any treaty or agreement," 63 Ct. Cl. 270, and the ground of the decision was that a claim which had been settled by an agreement was not a claim *arising under or growing out of an agreement*. 63 Ct. Cl. 272-273, 274. Here, on the other hand, the jurisdictional act extends to "all claims of whatsoever nature which the Klamath etc. Indians * * * may have against the United States," not only *under* any treaty or agreement or act of Congress, but "for failure of the United States to pay said Indians any money or other property due," excepting only claims heretofore determined by the Court of Claims. Compare *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 337, where the jurisdictional act was similar to that in the present case.

extent the reopening of settlements might be limited by other provisions of the jurisdictional acts.[1]

Besides, the choice between perpetuating an unconscionable settlement with an Indian tribe and suffering the inconvenience of reopening a claim for determination on the merits is a question of policy for Congress to decide in each case as it arises.

3. In the present case Congress has left no room for doubt as to its intention. The provision already quoted must be construed as waiving a defense based on a payment made and received by the Indians as payment in full or it means nothing, since in no event could a partial payment be pleaded as an estoppel.

4. The same clear purpose is shown by the words describing the claims authorized to be submitted—"all claims of whatsoever nature which the Klamath Indians * * * may have against the United States, *which have not heretofore been determined, by the Court of Claims,* * * * for determination of the amount, if any, etc., etc." The act could be no broader save for the exception of claims heretofore settled by adjudication of the Court of Claims. And, as heretofore observed, if Congress had intended to except also claims heretofore settled or attempted to be settled by agreement between the parties it must be presumed that it would have been equally explicit in saying so.

5. There is also the provision that, "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians,"

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[1] Of the fifteen jurisdictional acts referred to in the Government's brief ten are limited to claims *arising under or growing out of* any treaty or agreement or act of Congress, as in the case of The Creek Nation referred to in the preceding foot-note.

showing again that the purpose of the act was to arrive at a just settlement *de novo*, forestalling all pleas in bar based on estoppel or limitations on the one side or on the irrevocability of gifts on the other.

6. The jurisdictional act concededly embraces claims of the Klamath Indians growing out of an erroneous survey of the boundaries of their Reservation made in 1871, and yet, as heretofore shown, those claims had been previously settled in an agreement made in 1901 and ratified by Congress, and the committees of Congress which recommended the passage of the jurisdictional act had full knowledge of the settlement, showing again that the act was intended to include claims which had been the subject of prior settlement agreements as well as unsettled claims. Brief in support of petition, pp. 13-14.

In answer to this the Government in its brief suggests that the jurisdictional act does not permit the settlement agreement of 1901 to be reopened but only permits it to be construed. P. 12. But as the agreement expressly provided in Article II that the payment made was "in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their Reservation in 1871," 34 Stat. 367, it is clear that the Court must go behind the settlement, and not merely construe it, in order to adjudicate the boundary claims.

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